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Exhibit No. 71 is as follows:

(Exhibit 71.)

United States Engineer Office

Upper Mississippi River
Improvement

Rock Island, Ill.,
December 24, 1909.

[fol. 158] Mr. M. D. Rhame,
Division Engineer, C. M. & St. P. Ry. Co.
Minneapolis, Minnesota.

Dear Sir:

I have your letter of Dec. 17 requesting permission to perform certain work in double tracking and improving alignment of the River Division of the C. M. St. P Ry. on west side of Mississippi River between Minneiska and Whitman, and in vicinity of La Moille.

The map accompanying your letter, showing the proposed work, has been carefully examined and nothing having been found therein prejudicial to the interests of navigation, or in any way interfering with the proposed Government improvement of the river, this office will make no objection to your going ahead with the work, as shown on the map.

Very respectfully,

C. S. RICHE,
Major, Corps of Engineers.

Thereupon the Government called ROBERT C. JOHNSON as a witness who testified as follows: He was an employee of the United States Engineers at St. Paul, Minnesota, and that Government Exhibit 10 was prepared and constructed under his supervision; that so far as the topography there shown, it was identical with Railroad Exhibit 1; that Exhibit 10 was what is known as flowage map. There are three different colors shown. The red or pink area indicates a depth of water of one foot or less. The yellow area indicates a depth of water between one and two feet. The blue area indicates two feet or more depth of water. These are with the pool at elevation 660. This is a topog-

raphy map and in it the streams are located and the towns and any features such as railroad or roads are shown. Referring particularly to the contours which are outlined in yellow or pink, when the flowage survey was made elevation was taken at various places in the pool and using these elevation contours were drawn and the areas between these contours are indicated in colors on the map so far as to indicate the various depths of water. The white-colored [fol. 159] areas indicates land that is above water. A dashed line extending across and through the blue colored portion indicates miles above Dam No. 5. The location of the railroad right of way is indicated by a long dash and two dots.

Thereupon the Government's Exhibit 10 was offered in evidence and received. (The original exhibit has been transmitted to the Circuit Court of Appeals by order of the District Court.)

Thereafter counsel for the condemnor made the following motion:

Mr. Harrington: May it please the Court, the Government at this time presents a motion for an order dismissing from these proceedings certain sections of the railroad track in question identified by stations in the written motion.

With respect to the motion, it concerns the four segments of the Milwaukee Railroad track which were referred to in the opening statement of the Government as claimed encroachments in and on the bed of the Mississippi River.

With respect to the motion, I desire to state that the Attorney General has instructed, by a 'phone conversation, that he has been requested by the Secretary of War to dismiss these segments of the railroad track from the proceeding, and the Attorney General's instructions to us are based upon that request.

Our telephone information is that the Secretary of War's request is in the process of transmission here now, and we expected it to arrive, according to the telephone conversation, before the time came to close the case. However, it has not been received as yet, and in connection with this motion, we request permission to file that request

when it is received, which will probably be not later than tomorrow, according to our information. I will present this written motion to the Court; which has an order attached to it with the request that it be made a part of the Court's file:

[fol. 160] A motion for a directed verdict was made by the United States of America upon grounds not here material.

Written motion for order dismissing was not filed until the following day but is inserted below for the convenience of Court and counsel:

(Motion of Government For Order Dismissing From Petitions Certain Segments of Right of Way.)

Comes now the United States of America, the Petitioner herein, and moves the Court for an order dismissing from the [Petitition] for Condemnation herein in files Nos. 459, 460 and 461, all that portion or segment of the railroad right of way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Western Union Telegraph and Cable Company lying in and between the following railroad stations, to-wit:

1. Between stations 4990+86.5 to 4978+86.5, a distance of 1200 feet.

2. Between stations 4968+86.5 to 4948+86.5, a distance of 2000 feet.

3. Between stations 4936+00 to 4927+00, a distance of 900 feet.

4. Between stations 4807+00 to 4795+00, a distance of 1200 feet.

This motion will be based upon all the files, records, and proceedings in the above-entitled cause.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney,
Daniel F. Steck and
John J. Courtney,
Special Assistants to the
Attorney General.

[fol. 161] Mr. Erdall: If the Court please, this is rather a new one to me. We have been notified by the engineer who has charge of this work, to protect our railroad, stating and giving the elevations which the water was to be at the dam at Minneiska, and what the elevation was to be just below Dam Number 4, in this pool, and we have been told that the water would be raised at or shortly after April 1, 1935.

We have protected our railroad to a considerable extent,—not all of it, but a good share of it,—and it has been protected to a very considerable extent; a good share of the work has been done in these areas which they are now asking us to have withdrawn from this proceeding. We have already been damaged in a very large sum of money upon the instructions which were given to us, and which were given the public generally under that notice.

The Court: These proceedings were instituted by the United States District Attorney for this District, Mr. Sullivan, by direction of the Attorney General, under an instruction from the Secretary of War, and the petitions were filed in these proceedings under that instruction. The Secretary of War was authorized to build this dam and to take this easement in the property of the Railroad Company along by the dam, and the proceeding has gone so far that it has been heard before the Commissioners appointed by this Court, and they have made their award; the dam has been put in, and is completed, and the pool has been raised to the level where it is taking the easement required to be taken under an instruction of the Secretary of War. The Government has actually taken the easement, and as I say, the litigation has proceeded so far that the case was tried before the Commissioners and they have made their award, and there is an appeal from that award pending in this Court, and we are trying the question in this court.

It does not seem under the circumstances that the Government is entitled to dismiss this proceeding. I under-[fol. 162] stand that ordinarily the Government of the United States is entitled to abandon a proceeding for condemnation at any time it sees fit, except that it cannot take the property into its possession and creates a situation as

is created here, keeping the easement that they have already acquired, and at the same time dismiss the condemnation proceedings so that the person damaged cannot recover.

I do not believe that they are entitled to dismiss at this time, and I deny the motion.

Mr. Harrington: May we have an exception.

The Court: Yes, an exception is allowed.

Mr. Harrington: Now, I think that we have prepared to close our case.

The Court: Very well; both sides rest.

Mr. Courtney: I take it, Your Honor, that we may file the instructions of the Secretary of War, or the request of the Secretary of War, upon which this motion is based, when it does arrive, so that it may become a part of the record.

The Court: Oh, yes, you can do that.

[fol. 163] (December 18, 1935, 10 o'clock A. M.)

The Court reads its instructions to the jury as follows:

(Court's Instructions to the Jury.)

The Court: Ladies and Gentlemen of the Jury;

Technically, there are four proceedings before you; there are four appeals from the award of the Commissioners made in these condemnation proceedings, in which awards were made to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and the Western Union Telegraph & Cable Company. I shall hereafter refer to these two parties as the Railroad and the Telegraph Company.

These proceedings were instituted in the name of the United States of America, and on its behalf by George F. Sullivan, United States Attorney for the District of Minnesota, at the instance of the Attorney General of the United States and at the request and direction of the Secretary of War, duly authorized by Act of Congress of the United States under which the Secretary of War is author-

ized and directed to create a nine-foot channel in the Mississippi River, between the mouth of the Illinois River and the City of Minneapolis, and to that end to construct, maintain and operate certain locks and dams.

The Railroad's line, running from Chicago to Minneapolis, or the Twin Cities, passes by on the west side of Lock and Dam Number 5, which is hereafter spoken of. The lands on which the Milwaukee Road is built are owned by the Railroad and the telegraph lines, owned by the Telegraph Company, are placed on that road by some contract with the Milwaukee Railroad, giving therefor the Telegraph Company an interest in the road to the extent of having a right to maintain and place its poles and wires thereon.

The Railroad lands which are involved in this case are [fol. 164] shown by the deeds which they put in evidence. It is sufficient to say that the portion of the railroad involved in this case is about seven and one-quarter miles, extending from the dam westward along the side of the dam, and the telegraph wires and the right of way of the Railroad Company is situated on that land, and is about seven and one-quarter miles long.

The petition in these proceedings sets forth that the dam shall be constructed so that it will create and take a flowage easement of the crest elevation of 660 feet above mean sea level on the railroad property and embankment.

The Mississippi River is a navigable stream and it is admitted by all parties concerned in this controversy that the Railroad is the riparian owner of the lands along the Mississippi River, where the said railroad runs along the westerly side of the river, from the dam up the stream, along the entire length of the property being flowed, as before stated.

By the commerce clause of the national Constitution, Congress is empowered to regulate commerce on navigable waters and streams in the United States, and has the right to use and improve such navigable waters for the purposes of navigation, within certain limits, without compensation to the riparian owners; that is, within certain limits. In view of the fact that it has been stipulated between the par-

ties to these proceedings that no damage was or will be occasioned to the Railroad Company or Telegraph Company by reason of the water in the Mississippi River being permanently raised to the level of ordinary high water mark, by Dam Number 5, it is not necessary for the Court to instruct the jury as to such limitations; that is, the limitations that I refer to are the limitations as to taking property without just compensation,—other than to say that for all damage directly or proximately caused to the Railroad Company and the Telegraph Company, by the taking of the flowage easement from the level of ordinary high water mark to 660 feet above mean sea level, the United States is liable to the Railroad Company and the Telegraph Company. That means that so far as the Gov- [fol. 165] ernment in these proceedings takes a flowage easement in the property of the Railroad Company and the Telegraph Company above high water mark, and up to 660 feet above mean sea level, it must pay compensation for any damage it does, or for any taking. And as it is stipulated that all of the damage that has been occasioned to the properties of the Railroad Company and the Telegraph Company arises from raising the water from the level of ordinary high water mark to 660 feet above mean sea level, and that none of such damage was caused by raising the water to the level of ordinary high water mark, you have only to consider what damage was done by taking the flowage easement, aforesaid.

The Government has the right to acquire a flowage easement in the land as it is doing, in aid of navigation on the Mississippi River. It has the right to take this land, or an interest in this land by virtue of the power of eminent domain, but the Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for public use without just compensation, and in taking this property the Government is required to pay to the owner thereof just compensation.

It will be necessary for you to determine from all of the evidence in the case, in the light of the instructions given, what constitutes just compensation for the taking of the easement which is being taken in this case, both to the Railroad Company and to the Telegraph Company.

As you have learned in the course of this trial, the Telegraph Company is interested in the telegraph line and the poles situated upon the railroad.

The claims of the Railroad and of the Telegraph Company are consolidated and are being tried here as one proceeding, and will require only one verdict, although we will also ask you for several special verdicts. The general verdict will cover both the compensation to the Railroad Company and to the Telegraph Company, to which you find they are entitled.

Just compensation for the taking of property for public use is to be measured by the loss occasioned to the owner [fol. 166] for its appropriation. The compensation must be the full equivalent of the property taken. The owner is entitled to be placed in as good a position as he would have been if his property had not been taken. The owner is entitled to receive the full market value of his property taken, the sum that would, in all probability result from fair negotiation between an owner who desires to sell but is not compelled to do so, and a purchaser who desires to buy but is not compelled to buy. The compensation is to be estimated by reference, not only to the present use of the land, but to all the uses for which the property is suitable. The value should be fixed as of the date of taking possession, which in this case was August 4, 1934. It is not proper to estimate the value of the easement taken by public necessities as to its worth to the public for the purpose for which it is taken, because it is not what the Government gains but what the owner loses, which measures the damage or compensation.

If all or any part of the land is peculiarly adopted for some particular use, that should be taken into consideration in arriving at the value.

When the owner of property has received the full market value of land taken, or the interest in land taken for all of its available uses, he has received just compensation.

In measuring the compensation to which the Railroad Company and the Telegraph Company are entitled, you should allow for the flowage easement taken by the Government, the costs of adjusting the railroad structures

and the telegraph structures, so as to meet the new conditions created by maintaining the flowage easement along the property at 660 feet above mean sea level. This may include the reasonable cost of raising and widening the embankment, riprapping the slopes of the embankment, raising or adjusting the bridges, changing and adjusting culverts, widening or raising the railroad embankment and tracks, changing the telegraph lines and other structures, which changes are made reasonably necessary by reason of the taking of said flowage easement by the Government, that is, which changes are reasonably necessary to place [fol. 167] the [the] Railroad and the Telegraph Company in as good a position after the taking as they were in before the taking.

The Railroad Company and the Telegraph Company are entitled to be placed in as good a situation after the taking of the easement as they were before. They are entitled to have the railroad property, including the culverts, bridges, and telegraph lines changed and adjusted, if that be necessary, to make the road and its property as safe for railroad purposes after the taking of the easement as it was before, and are entitled to recover in these proceedings from the Government, the reasonable cost of so adjusting the Railroad and Telegraph properties.

It has been stipulated and agreed between the parties to these proceedings, that the taking of a flowage easement upon the railroad, up to the level of ordinary high water mark will not and has not damaged the Railroad or Telegraph Companies. All of the damage that has been done to the railroad has been done by reason of taking a flowage easement above the level of ordinary high water mark and up to 660 feet above mean sea level.

[Therefor], you are instructed that neither the Railroad Company nor the Telegraph Company have in anywise been damaged or injured by the taking of the flowage easement in the property mentioned to the level of ordinary high water mark and that neither the Railroad Company nor the Telegraph Company are entitled to recover any compensation by reason of the taking of the easement up to the level of ordinary high water mark. There is no dispute about what is the ordinary high water mark in this case; that has been agreed upon by the parties.

You are instructed that all of the damage caused to said Railroad Company and Telegraph Company resulted from the taking of a flowage easement from the level of ordinary high water mark to 660 feet above mean sea level. The evidence discloses that the railroad crosses certain streams which are tributary to the Mississippi River, including the Whitewater River. The railroad is carried across these streams by means of bridges in some instances, and by means of culverts in others. These streams flow through [fol. 168] the railroad on the property of the Railroad. It is the claim of the Railroad and the Telegraph Companies that the raising of the pool by Dam Number 5 and the raising of the water to 660 feet above mean sea level along the railroad, will necessitate changes in the culverts and bridges.

(Portion of charge relating to Bridge reconstruction not in this appeal is omitted.)

You are instructed that the riparian owner of property along the Mississippi River has the right to the enjoyment of the natural flow of the river without burden or hindrance imposed by artificial means, and the United States has no easement beyond the natural one, without grant or dedication, save by condemnation with appropriate compensation for the private right.

As stated before, it has been stipulated that the taking of an easement in the Railroad and Telegraph properties to the level of ordinary high water mark has not resulted in damage to the Railroad Company and the Telegraph Company's properties, and that all the damage which has resulted has been occasioned by taking an easement from the level of ordinary high water mark to 660 feet above mean sea level, and this instruction that the riparian owner of property has the right to the enjoyment of the natural flow of the river, must be modified in this case to the extent of saying that the raising of the water above its natural flow, up to the level of ordinary high water mark, has done no damage, and therefore that instruction must be modified to that extent.

You are instructed that the right to have the water flow away from bridges and culverts extending through the

railroad embankments, unobstructed except as in the course of nature, is an inseparable part of the land, and a destruction of this right is a taking of a part of the land for which the United States must make appropriate compensation to the owner of such right. But here it must also be kept in mind that the Railroad and Telegraph Companies can only recover under such circumstances if the damage occurs by reason of the water being raised in the Mississippi River above the level of ordinary high water mark. [fol. 169] That is, this instruction that the property owner, —in this case the Railroad Company and the Telegraph Company,—have the right to have these streams flow away from its property, unobstructed, as it has in the past, is modified by the stipulation of the parties that no damage was done by interfering with the natural flow of the river by raising it to the level of ordinary high water mark.

As a riparian owner on the Whitewater River, the Railroad Company and the Telegraph Company are entitled to the natural level and flow of that river in its channel and bed, as it existed prior to the artificial raising of any waters by the construction and operation of Lock and Dam Number 5, and if from the evidence you believe that Dam Number 5 will artificially raise the natural levels and obstruct the natural flow of that river, so as to require changes in the railroad embankment, its Bridge L-90, tracks and structures, or so as to require changes in its signal and telegraph lines, in order to render the same as safe and efficient as they were in a state of nature prior to the raising of such waters, then your verdict should include the reasonable cost of adjusting such property of the Railroad and Telegraph Companies to the artificial changes in the levels and flows of the Whitewater River.

Here it also must be kept in mind that the raising of the water in the Mississippi River to the level of ordinary high water mark has not resulted in any damage to said tracks and property and structures.

You are instructed that where private property is actually invaded by superinduced additions of water, earth, sand or other material, so as to effectually destroy or im-

pair its usefulness, it is a taking within the meaning of the United States Constitution.

You are instructed that the riparian owners are entitled to recover for damage done by ice and water being thrown against the property by reason of the raising of the Mississippi River above the level of ordinary high water mark. If there was any such damage caused, it is strenuously contended here by the Government that so raising the water has not occasioned any more damage by the raising of the water, and the ice, than before.

[fol. 170] You are instructed that if the impounding of the waters of the Mississippi River by the construction of Lock and Dam Number 5 makes it necessary for the Railroad Company and the Telegraph Company, respectively, to raise its tracks, to widen its embankments, to riprap its embankments, or to change the location or strengthen its bridges, culverts, signal and telegraph lines, or other structures or appurtenances, that such items are proper items for you to take into consideration in ascertaining the amount of compensation which said Railroad and Telegraph Companies are entitled to recover from the United States.

I do not think it is necessary or advisable for the Court to extend this Charge by undertaking to state to you all of the claims of the respective parties, nor their contentions concerning these claims. The two largest claims made by the Railroad and the Telegraph Companies relate to riprapping the embankment and the raising of Bridge L-90, and the tracks adjacent thereto. The claim of the Railroad for damage to Bridge L-90 is made on the theory that the bridge will finally have to be raised some three feet by reason of the deposit of sand and silt coming down the Whitewater River.

The Government claims that there will be no necessity whatever for such change; that the opening under the bridge is sufficient to take care of this river and that there will never be any substantial raising of the bed of the river at that point, at least, that there will never be any such raising as to incapacitate the bridge from taking care of the water flowing in the Whitewater River.

The hydraulic engineers and experts have testified pro and con upon the disputed claims in this respect, and it is for you to jud e who is right in that respect, bearing in mind always that the burden of proof is upon the plaintiff to establish its cause of action, and any claim for damages which it asserts.

A great deal of evidence in this case is opinion evidence as to what will eventually happen to the Railroad properties from the action of water and ice and waves, and as to what will happen to the Bridge L-90 by reason of the deposition of sand and silt. You have no right to speculate [fol. 171] on what will happen, nor base your opinion as to what will happen upon speculative evidence, but you have the right and should base your findings of fact upon the opinions of experts, given in evidence, if you are satisfied from such evidence that the opinion given is correct.

The opinions of experts are based upon a given set of facts, and are valuable as coming from learned men who are experienced in the subject, and you are entitled to consider the opinions of such men in forming your idea of what is right. Such opinions are not speculative, that is, they may be and are intended to state what will happen in this case in the future, but they are opinions of men who are basing their conclusions upon facts. They may be wrong,—in this case somebody is wrong; some of the experts are saying one thing, and the others are saying diametrically the opposite; both of them cannot be right, but it is for you to say who is right. Of course, the experts in giving their opinions, always give the reasons for their opinions, and, of course, you, in weighing their evidence and deciding between the experts, will have to consider and should consider the reasons on which they base their opinions. One opinion may be of more value than another, but it is for you to decide which is right. All I wish to emphasize by this statement is that opinion evidence is not speculative evidence. You should not speculate as to what will happen in the future, but you have the right to consider the opinions of experts which are admitted in evidence in determining what will happen in the future.

There can be but one recovery of compensation by the Railroad and Telegraph Companies for the taking of said flowage easement and all damages, present and future, which from the evidence you believe the Railroad Company and the Telegraph Company will sustain as a direct and proximate result of said taking, must be recovered in these proceedings.

Part of the work in making the changes which the Railroad and Telegraph Companies claim were made necessary has already been done, and evidence relative to that part of the work has been introduced, tending to show the actual cost and reasonable cost of the work. A large part of the work which the Railroad Company claims is ren- [fo]. 172] dered necessary has not yet been done, and the Railroad Company has introduced evidence tending to show what the reasonable cost of that work will be.

The Government has introduced evidence tending to dispute and refute the claims of the Railroad and Telegraph Companies, and tending to show that the damages were much less than claimed.

All of this evidence should be carefully considered by the jury. The Government is acquiring a perpetual right to impound the water in a pool by Dam Number 5 to an elevation that will flow the railroad by water to 660 feet above mean sea level, along the whole extent of that portion of the railroad in controversy here.

The jury in considering the damages to be allowed the Railroad and Telegraph Companies must consider that the Government is taking the flowage to the height named, without any deduction or allowance based on the possibility that the pool may be periodically lowered, because the Railroad Company and the Telegraph Company have no right to have the pool lowered, and the Government would be under no duty or obligation to lower the pool below the elevation that would flow the railroad track with water to the elevation of 660 feet above mean sea level, and after the judgment is entered in this case, it cannot be changed or any recovery had by the Railroad and Telegraph Companies, other than that recovered in these proceedings.

The Government has a right to the use of any navigable stream for navigation purposes, and to improve it for navigation purposes, and for that purpose, so far as this case is concerned, to raise the water to the level of ordinary high water, but not above it, without giving compensation.

I am saying this because it has been stipulated in this case that no damage was done by raising the river to the level of ordinary high water mark, and therefore the Government is entitled to so raise the river in this case, free from any obstruction to navigation, without giving compensation, that is, raising it to the height up to the level of ordinary high water mark.

[fol. 173] The United States is acquiring in these proceedings a flowage easement in the Railroad and Telegraph properties. An easement of flowage right is distinct and separate from a fee title or absolute title to the land. It does not mean that the Railroad and Telegraph Companies will be dispossessed or prevented from using their property in the future. The Railroad Company and the Telegraph Company will have the right to use their property as they did before, subject only to the concurrent use of the property by the Government, by flowage, up to 660 feet above mean sea level, at the railroad embankment.

I have instructed you that the burden is upon the Railroad and Telegraph Companies to establish their right to recover from the Government by a fair preponderance of the evidence. If the evidence is evenly balanced on any issue of fact, you should resolve that fact against the Railroad Company and the Telegraph Company, and in favor of the Government, for where the evidence is evenly balanced, then the Railroad and Telegraph Companies have not proven the fact by a fair preponderance of the evidence. By preponderance of the evidence and burden of proof, is meant evidence that is more convincing and credible than the evidence to the contrary. Preponderance of evidence means the greater weight or convincing power of the evidence. The preponderance of the evidence does not necessarily or wholly depend upon the number of witnesses on either side, although that is one thing to be considered, but it depends likewise upon the weight and credibility which you attach to the evidence of each witness. You may

become satisfied that the evidence of one witness may be entitled to greater weight or credibility than that of another witness, or even of several witnesses, and you may give it such weight, in determining where the preponderance lies. It is the special duty of the jury to scrutinize and weigh the evidence and determine the credibility of the witnesses. You should, as to every witness, consider his appearance, his learning, his manner of giving testimony, his frankness or evasiveness, as the case may be, his interest in the result of the trial, if any appears, his fairness or partisanship in giving his testimony, his opportunity to know the facts testified about, and all of the facts and cir- [fol. 174] cumstances appearing on this trial, which either support or discredit the testimony of the witnesses, and you should give to the testimony of each witness such weight and credit as you believe it is fairly entitled to receive.

You are the sole and exclusive judges of the facts in this case, and of the credibility of the witnesses, and if the Court has said anything in this case to you which seems to indicate an opinion of the Court as to any fact, you should disregard it, for it was not the intention of the Court to do so.

It is your duty to take the law from the Court as the Court gives it to you, and apply it in arriving at your verdict.

In considering this case, you should do so dispassionately and without championing either side. Feeling always destroys the power to think straight and reason; you should not champion any side; you should calmly consider the evidence and determine the facts.

The form of verdict which will be handed to you, you will observe requires, first, a general verdict covering the whole amount which the Railroad and Telegraph Companies are entitled to recover. The claims of the respective parties have been tried jointly in this case. The form, you will notice, requires special verdicts. You will observe that these special verdicts cover every item of damage claimed by the Railroad and Telegraph Companies and their sum, of course, should equal the total amount included in your general verdict. Special Verdict Number Three will not

give you any trouble, as there the parties have agreed as to certain items, and have agreed that the damage in respect to that is $2,118.75.

You have been saved, I think, a great deal of trouble by the attorneys making a statement which they have handed to you, showing exactly what the respective claims of the parties are.

Upon reading the form of verdict, you will find that it indicates, first, that there must be a general verdict including all of the damage that you are giving to both the Railroad and the Telegraph Companies. That is included in [fol. 175] your general verdict, and that part of it reads as follows: "We, the jury in the above-entitled causes, assess the compensation to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and the Trustees under its mortgages, and the Western Union Telegraph Company, for the taking of the flowage easement described in the petition herein, and the amendment thereto, in the total sum of ..... Dollars." There, you will write in the total sum that you are allowing to these parties, the Railroad Company and the Telegraph Company. Then you are required to give special verdicts, as follows: "Included in and as a part of our general verdict, we have allowed the Railroad Company, the Trustees under its mortgages, and the Telegraph Company, the sum of ..... dollars for damages in and protection for their railroad, telegraph and signal lines." There you will insert that amount. You have a paper in your possession, each one of you, showing the respective claims of the parties in that respect.

Your second special verdict is as follows: "Included in and as a part of our general verdict, we have allowed the Railroad Company and the Trustees under its mortgages, the following amount for changes in and protection of: (a) Culvert L-527; (b) Culvert L-80; (c) Culvert L-84; (d) Bridge L-82; (e) Bridge L-90."

If you find for the Railroad and Telegraph Companies on Bridge L-90, you will write in there the amount. If you find against them, that they are not entitled to recover anything for that bridge, you will simply write in there "Nothing"; you can write in the word "Nothing", or put

it in, in such form as you see fit, indicating that you have allowed them nothing.

The third special verdict is as follows:

"Included in and as a part of our general verdict, we have allowed to the Railroad Company and the Trustees under its mortgages, the sum of $2,118.75, for changes in and protection of all the following described small bridges and culverts,"—and there they are enumerated. That item is agreed upon.

[fol. 176] And the fourth special verdict is as follows:

"Included in and as a part of our general verdict, we have allowed the Railroad Company and the Trustees under its mortgages, the sum of ..... dollars for necessary riprap and bank protection of the railroad embankment."

You will date your verdict and have it signed by your foreman. Your verdict must be by the unanimous consent of the jury.

Ladies and Gentlemen of the jury, I am going to leave you in possession of this room. The exhibits are all here, and you will therefor have the benefit of being in this room where everything is, instead of going to some juryroom. Swear officers.

Mr. Harrington: If Your Honor please, my attention has been called to the fact that notwithstanding our discussion of Monday afternoon, that we are required to take our exceptions to the Charge after it is given.

The Court: Well, I will consider that all of the exceptions that you have already taken will be considered as taken now before the jury goes out.

Mr. Erdall: That covers, of course, both parties.

The Court: That covers both parties. Swear officers.

Mr. Erdall: If Your Honor please, there is one more fact,—I think there were three of the Government Exhibits that possibly have been marked, in connection with their proof, that were not admitted. I assume that they should not go to the jury; it would just be confusing to them, and that Exhibits 60, 70 and 71.

The Court: Well, take out everything that is not in evidence.

Mr. Erdall: Well, that is agreed between the both of us, and I think that they should not be turned over to the Clerk.

Mr. Harrington: Well if Your Honor please, I am still somewhat disturbed about the status of the record. The Circuit Court of Appeals for this Circuit has said that they will not consider an assignment of error unless on the basis of the instructions,—unless it appears in the record that the exceptions were taken.

[fol. 177] The Court: Well, does not that appear in the record?

Mr. Harrington: Well, not after the Charge was given; that is the thing that is disturbing us. We have a complete record as of the Monday afternoon proceedings.

The Court: Well, gentlemen, I understood that these exceptions, and your position in that respect were put in the record, and I will consider that they are, put in the record at this point of the proceeding, and that you make the same objections now that you did then, and take the same exceptions now.

Mr. Harrington: Well, then, may that be mutually stipulated as to that understanding, Mr. Erdall?

Mr. Erdall: Oh, yes, certainly, certainly.

The Court: Now, you can swear the officers.

And the jury thereupon retired to consider their verdict. Thereupon on the 20th day of December, 1935, the jury rendered a verdict for the condemnee and against the condemnor.

Forasmuch as the matters above set forth do not fully appear of record, the appellant tenders this a bill of exceptions, and prays that the same may be signed and approved by the Judge of this Court.

Dated this 1st day of July, 1939.

(Endorsed—Proposed Bill of Exceptions 459, 460-461) Filed August 22, 1939, Thomas H. Howard, Clerk, By William H. Eckley, Deputy.

[fol. 242] Order Settling Bill of Exceptions With Amendments.

United States District Court For the District of Minnesota, First Division.

United States of America.

vs.

Certain Lands in Winona and Wabasha Counties, Minnesota; Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph Company.

File No. 459 and File No. 460-461.

The foregoing Bill of Exceptions is herewith certified and allowed as the Bill of Exceptions in this Court and comprises a record of all the material evidence in this cause and proceedings had upon the trial of this action (except exhibits referred to therein which will be forwarded to the Clerk of the Circuit Court of Appeals), said Exhibits to be and hereby are made a part of said Bill of Exceptions.

It is further ordered that the appellant herein having conceded and accepted the appellees proposed amendments numbered 1 to 5, 11 and 12, 15 to 26 inclusive, and 29, the same shall be included in the foregoing Bill of Exceptions, and the said Bill of Exceptions is hereby approved, allowed and settled, and made a part of the record herein; and Railroad's proposed amendments numbered 6-7-8-9-10, 13-14, and 27-28, are disallowed.

It is further Ordered that pursuant to the stipulation of the parties and of the Order of the Circuit Court of Appeals thereon, dated August 14, 1939, this Order shall apply with like effect to the Bill of Exceptions in file number 460-461, consolidated. Let this Order be entered Nunc

Pro Tunc for the Order of the Court dated September 7, 1939.

GUNNAR H. NORDBYE,
United States District Judge.

(Endorsed): Filed September 27, 1939. Thomas H. Howard, Clerk, By William H. Eckley, Deputy.

[fol. 243] (Order For Transmission of Certain Exhibits to Appellate Court.)

United States District Court For the District of Minnesota, First Division.

United States of America,

vs.

Certain Lands in Winona and Wabasha Counties, Minnesota; Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph Company.

File No. 459 and File No. 460-461.

On motion of the United States by John J. Courtney, Special Assistant to the Attorney General, it is ordered that in addition to the transcript of record on appeal in this action that the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri, the following original exhibits to be by him safely kept and returned to this Court upon the final determination of this action in the United States Circuit Court of Appeals for the Eighth Circuit; namely, Government Exhibits 1, 2, 3, 9, 10 and 69-70-71, and Railroad Exhibits 1 and 2.

It is further Ordered that said exhibits need not be printed in the record.

Dated this 27th day of September, 1939.

GUNNAR H. NORDBYE,
United States District Judge.

(Endorsed) Filed September 27, 1939, Thomas H. Howard, Clerk, William H. Eckley, Deputy.

[fol. 244] (Praecipe For Transcript.)

To the Clerk of the Above Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to an appeal allowed in the above-entitled cause, and to include in each transcript of record:

1. Petitions for Condemnation in File No. 459 and File No. 461, dated December 30, 1933, excepting Exhibit "C" and excepting therefrom such parts of Exhibits "A" and "B" as do not pertain to the Railroad easement.

2. Orders Granting Condemnation and Appointing Commissioners, dated April 14, 1934, Files Nos. 459 and 461.

3. Orders Granting Immediate Possession, File No. 459 and File No. 461.

[fol. 245] 4. Further Report and Award of Commissioners as to Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Western Union Telegraph Company, filed April 8, 1935, in File No. 459 and File Nos. 460-461.

5. Notices of Appeal from Award of Commissioners in File No. 459 and File Nos. 460-461, dated May 4, 1935, by the United States.

6. Verdict on Appeal, dated December 21, 1935, in File Nos. 459, 460-61.

7. Stipulation for Division of Verdict and Form of Entry of Judgment, in File Nos. 459, 460-61, dated January 3, 1936.

8. Judgment, dated January 6, 1936.

9. Petition and Order Allowing Appeal in File No. 459, dated April 6, 1936, and Petition and Order Allowing Appeal in File No. 460-61, dated August 10, 1936.

10. Assignments of Error in File No. 459, dated April 6, 1936, and Assignments of Error in File No. 460-461, dated August 10, 1936, omitting from each "all Assign-

ments of Error save and except Assignments Nos. XII and XIII, and that portion of the Assignment of Errors which charges error in the entry of judgment thereon", in accordance with the Order of the Circuit Court of Appeals herein, dated September 10, 1938, in each cause.

11. Notice of Appeal in File No. 459, dated April 6, 1936, and Notice of Appeal in File No. 460-61, dated August 10, 1936.

12. Citation in File No. 459, dated April 6, 1936, and sundry extensions noted, and Citation in File No. 460-61, dated August 10, 1936, and sundry extensions noted.

13. Motion and Order thereon in Circuit Court of Appeals dismissing portion of appeal and reforming judgment dated September 10, 1938, in File No. 459 and in File Nos. 460-61.

14. Mandates, dated September 10, 1938, in File No. 459, and File Nos. 460-61.

15. Stipulation combining record on appeal in File No. 459, and File No. 460-61.

16. Order of Circuit Court of Appeals, conforming stipulation and combining record, dated August 14, 1939.

17. Bill of Exceptions, in File Nos. 459, 460-61, combined.

18. Order Settling Bill of Exceptions, by Nordbye, J., dated September 7, 1939.

19. Order of Circuit Court of Appeals denying Appellees Motion for Supplemental Bill of Exceptions, dated September 15, 1939.

[fol. 246] 20. Railroads proposed amendments numbered 1-2-3-4-5, 11-12, 15-16-17-18-19-20-21-22-23-24-25-26 and 29, conceded by Government and allowed to Government's proposed Bill of Exceptions, and Railroad amendments 6-7-8-9-10, 13-14 and 27 and 28 disallowed.

21. Order of Nordbye, J., settling Bill of Exceptions, Nunc Pro Tunc, dated September 27th, 1939, with amendments allowed.

22. Order of Nordbye, J., for transmission of Exhibits, dated September 27th, 1939.

23. Designation of Portions of Record or Praecipe.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Eighth Circuit, printed under the supervision of said Clerk of the Circuit Court of Appeals for the Eighth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at St. Louis, Missouri.

Dated this 25th day of September, 1939.

JOHN J. COURTNEY,
Special Assistant to the
Attorney General.

Service of the above praecipe accepted and acknowledged this 27th day of September, 1939.

F. W. ROOT,
C. O. NEWCOMB &
A. C. ERDALL,
Attorneys for Appellees.

(Endorsed—Praecipe, 459, 460-461) Filed September 27, 1939, Thomas H. Howard, Clerk, By William H. Eckley, Deputy.

[fol. 247] (Clerk's Certificate to Transcript.)

United States District Court, District of Minnesota,
First Division.

I, Thomas H. Howard, Clerk of Said District Court, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 246 pages, numbered consecutively from 1 to 246 inclusive, is a true and complete transcript of the record and proceedings in said causes, wherein the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, is Petitioner, and Certain Lands in Winona County, Minnesota, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Western Union Telegraph and Cable

Company, et al., are Respondents; and the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, is Petitioner, and Certain Lands in Wabasha County, Minnesota, containing 3140 acres, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al., are Respondents; and the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota is Petitioner, and Certain Lands in Wabasha County, Minnesota, containing 1960 acres, Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al., are Respondents, and of the whole thereof (except as modified by the praecipe herein to be found at page 244 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify and return that I have annexed to said transcript and included within said paging the original Citations together with proof of service thereof. I also transmit original Exhibits as provided in the Order for Transmission of Exhibits to be found at page 243 herein.

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court at Winona, in the First Division of the District of Minnesota, this 18th day of October, A. D. 1939.

(Seal)
U. S. Dist. Court
Dist. of Minnesota
First Division

THOMAS H. HOWARD, Clerk,
By Mamie A. Bredeson, Deputy.

Filed Oct. 21, 1939, E. E. Koch, Clerk.

[fol. 248] (Order Denying Motion of Appellees for Allowance of Supplemental Record from District Court.)

United States Circuit Court of Appeals
Eighth Circuit

May Term, 1939.

Friday, September 15, 1939.

United States of America, Appellant,
No. 11,300. vs.
Certain Lands in Winona County, Minnesota, et al.

Appeal from the District Court of the United States for the District of Minnesota.

and

United States of America, Appellant,
No. 11,301. vs.
Certain Lands in Wabasha County, Minnesota, et al.

Appeal from the District Court of the United States for the District of Minnesota.

On notice there is this day presented to the Court motion of appellees for the allowance of a supplemental record from the District Court, and after hearing counsel in support of and in opposition to said motion, Mr. A. C. Erdall appearing for appellees, and Mr. John J. Courtney, Special Assistant to the Attorney General, for appellant, and the Court having duly considered the motion and opposition thereto, It is now here Ordered by this Court that the said motion be, and the same is hereby, in all respects denied.

September 15, 1939.

[fol. 249] (Order of U. S. Circuit Court of Appeals granting Motion to Omit Government's Exhibits 1, 2, 3 and 9, and Railroad Exhibit 2 from Printed Record, and Directing that Copies of Railroad Exhibit 1 be Inserted in Seven Copies of Printed Record, etc.)

United States Circuit Court of Appeals,
Eighth Circuit.

November Term, 1939.

Monday, January 22, 1940.

United States of America, Appellant,
No. 11,300. vs.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.

Appeal from the District Court of the United States for the District of Minnesota.

United States of America, Appellant,
No. 11,301. vs.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al.

Appeal from the District Court of the United States for the District of Minnesota.

Comes on for consideration by the Court the motion for an order, as to Government's Exhibits 1, 2, 3 and 9, and Railroad Exhibits 1 and 2, relieving appellant from the requirement of reducing and printing the same as required by Rule 12 of this Court, with supporting affidavit to the effect that to require inclusion of Railroad Exhibit 1 in the printed record would serve only to delay argument of these appeals and that the Court would be better informed and aided by use of the original Railroad Exhibit 1 which was used before the District Court.

Counsel for appellees have filed objection and supporting affidavit to said motion, especially as relates to Railroad Exhibit 1 and allege that the material portion of Railroad Exhibit 1 can be reproduced in the same colors as the original upon a reduced and accurate scale, all to the end that said exhibit can in convenient form be made a part of the printed record, and appellees offer, at their sole expense to so reproduce said exhibit.

After due consideration of the motion and objection, with affidavits, It is ordered by the Court that the motion of appellant be, and is hereby granted, except as to Railroad Exhibit 1, and as to said exhibit, It is ordered that appellees have reproduced and furnish to the Clerk of this Court seven copies on exact reduced scale for inclusion in the printed record but omitting from such reproduction the portion covering the Whitewater River Valley along the Whitewater River above Railroad Bridge L-90 of said river [fol. 250] which it is alleged is not involved in or material to the issues remaining in these appeals. To enable counsel for appellees to have such seven copies of said Railroad Exhibit 1 made, It is further ordered by this Court that the Clerk of this Court transmit said original Exhibit 1 to Mr. A. C. Erdall, one of the attorneys for appellees, at Minneapolis, Minnesota, to be safely kept by him during progress of making copies, and after having completed said seven copies the original exhibit shall be delivered to the Clerk of the District Court of the United [—] for the District of Minnesota, at St. Paul, for delivery to the Clerk of

this Court at St. Paul upon his arrival there in attendance upon the May Term 1940 of this Court.

And it is further ordered by this Court that the seven copies of said Exhibit 1 be used by the Clerk of this Court to have completed a like number of copies of the printed record by inserting same therein, and that five copies of the record with said exhibit inserted be retained by the Clerk for the use of the Court and his office, and that one copy each of the record with said exhibit be furnished to counsel for appellant and to counsel for appellees.

January 22, 1940.

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